

NOTICE
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2013 IL App (4th) 130005-U
NO. 4-13-0005
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 22, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
OMAR DeJESUS MARTINEZ,)	No. 11CF666
Defendant-Appellant.)	
)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it sentenced defendant to 12 years in the Illinois Department of Corrections.

¶ 2 Following a January 2012 jury trial, defendant, Omar DeJesus Martinez, was convicted of three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)). In March 2012, the trial judge sentenced defendant to three concurrent 12-year prison terms. Defendant filed a motion for a new trial and a motion to reconsider his sentence, both of which the court denied. Defendant appeals, contending the trial court abused its discretion in imposing a sentence of three concurrent 12-year prison terms. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On August 9, 2011, a McLean County grand jury returned a three-count

indictment against defendant alleging he committed three counts of aggravated discharge of a firearm in violation of section 24-1.2(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/24-1.2(a)(2) (West 2010)), by knowingly discharging a firearm in the direction of Mary Childs, Justin Roof, and Sean Spalding.

¶ 5 In September 2011, a second bill of indictment charged defendant with three additional counts of aggravated discharge of a firearm, alleging defendant, or one for whose conduct he was legally responsible, knowingly discharged a firearm in the direction of Mary Childs, Justin Roof, and Sean Spalding in violation of section 24-1.2(a)(2) of the Code (720 ILCS 5/24-1.2(a)(2) (West 2010)). In December 2011, the trial court granted the State's motion to dismiss the first three counts of the bill of indictment, leaving only the counts which charged defendant, under the theory of accountability, with aggravated discharge of a firearm.

¶ 6 Defendant pleaded not guilty and the matter proceeded to trial. During defendant's January 2012, jury trial the following evidence was presented.

¶ 7 A. The August 8, 2011, Incident

¶ 8 On August 8, 2011, Anthony Childs, his mother, and his girlfriend were outside the Childs' home unloading groceries from a vehicle. The two young children of Childs and his girlfriend were also present. Childs' friends from across the street, Brice Spalding, Sean Spalding, and Justin Roof, came over to the Childs' home to speak with Childs. Childs observed a pickup truck drive by with 10 to 15 people in the cab and bed. Defendant was in the cab of this truck. Childs heard the group in the truck yell something in his direction, though defendant testified the group outside the Childs' home yelled first. The truck circled around the block and parked two blocks away from Childs' house.

¶ 9 Childs walked with the Spaldings and Roof to a friend's house a block from his house. Thereafter, Childs observed the group from the pickup truck yelling and running up the street. Childs thought the two groups were going to fight but noticed that some of the people running toward his group of friends were pulling out guns, which prompted Childs and his friends to retreat to Childs' house.

¶ 10 As the group from the truck headed in the direction of the Child's home, both Childs and his mother observed defendant hand a gun to the actual shooter, Robert Gilliam, and encourage him to shoot. When the group arrived in Childs' yard, Gilliam fired between three and four rounds, but he was shaking and the bullets were off-target and did not strike anyone. As Gilliam was firing the weapon, Childs' daughter started to run outside where the commotion was but was caught before she got outside. Childs testified one bullet struck a glass bottle being held by Roof, but his testimony was disputed.

¶ 11 Two of Childs' neighbors, Joseph Wimp and Brad Hedstrom, also testified about the incident. They each observed defendant fleeing the scene and allegedly attempting to conceal a weapon. Hedstrom observed defendant run backward across a neighbor's yard and fire the gun one time.

¶ 12 Childs explained that his girlfriend was "freaking out," and after his family went inside, he chased the group containing defendant. Childs did not catch up with defendant or the group before they drove away in the pickup truck.

¶ 13 On this evidence, the jury returned a verdict finding defendant guilty on all three counts. The trial court ordered a presentence investigation report and set the sentencing hearing for March 2012.

¶ 14

B. The Sentencing Hearing

¶ 15

At defendant's March 2012 sentencing hearing, the State offered three witnesses in aggravation. The State presented the testimony of Officer Benjamin Brice of the Bloomington police department. Officer Brice testified that on June 23, 2008, he was dispatched to a fight call in Bloomington and made contact with defendant in the area of the fight call. Officer Brice arrested defendant, a juvenile at the time, for recording the exchange with audio and video. During the exchange, Officer Brice asked if defendant was a member of the Latin Kings, and he said he was.

¶ 16

The State also called as a witness in aggravation, Officer Todd Walcott of the Bloomington police department. Officer Walcott testified he had contact with defendant on November 25, 2009, when he pulled defendant over for a traffic violation and took defendant into custody. Officer Walcott asked defendant if he was a member of the Latin Kings, and defendant indicated he was.

¶ 17

The State then presented the testimony of Detective Matthew Dick of the Bloomington police department, the lead investigator in this case. Detective Dick testified that a known member of the Latin Kings, Jesus Garcia, was present on August 8, 2011, and was encouraging Gilliam to shoot the gun. Detective Dick also testified that another person, Dakoda Pherigo, was on the scene. Detective Dick explained that Pherigo and Garcia were involved in an incident on June 23, 2011, in which Pherigo fired a shotgun toward Garcia, causing birdshot to hit Garcia in the face. Detective Dick interviewed Gilliam, who admitted firing the weapon on August 8 and that he fired the weapon as a "favor to the Latin Kings." Detective Dick stated he believed the August 8 incident was in retaliation for the June 23 shooting.

¶ 18 Detective Dick also testified about two previous shootings in the Bloomington-Normal area involving the same gun Gilliam used on August 8, 2011. Detective Dick indicated defendant was a suspect in one of those previous shootings, but he was never questioned about it. Defendant was listed as a suspect in that incident because he allegedly threatened the intended victim for wanting to leave the Latin Kings.

¶ 19 The defense presented two witnesses in mitigation. Cristina Deutsch, a representative of Immigration Project, testified that her organization helps young Latin men get out of gangs. Deutsch spoke of defendant's family, explaining she had known them for years and that they were a very strong, supportive family. Deutsch also explained she would help make sure defendant stayed out of trouble if he received probation.

¶ 20 Defendant's sister, Lorena Garcia, also testified at the sentencing hearing. She testified that each member of defendant's family had lived a law-abiding life and that defendant has the full support of his large family. She also testified that her son has looked up to defendant and would like to still be able to do things together.

¶ 21 Defendant exercised his right to make a statement in allocution. Defendant expressed his remorse for his involvement in this incident and his affiliation with the Latin Kings. Defendant apologized to his family and the Childs family, and thanked God that no one was hurt during the incident.

¶ 22 In its recommendation to the court, the State argued defendant should receive 10 years' imprisonment on each count to be served consecutively. Defense counsel argued defendant should be placed on probation. The court noted the seriousness of the offense and the fact defendant's conduct could have caused serious harm. The court also took note of defendant's

gang affiliation and the motivation behind the offense. The court took into account defendant's minimal criminal history, but pointed out defendant was unable to successfully complete his prior probation. The court also acknowledged defendant's good family but expressed its doubts regarding whether the family would be able to keep defendant out of trouble. After hearing the arguments and considering all the evidence presented at trial, the sentencing hearing, and in the presentence report, the trial court sentenced defendant to three concurrent 12-year prison terms.

¶ 23 Following a November 26, 2012, hearing, the court denied defendant's Motion to Reconsider Sentence and his Motion for a New trial.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 A. Standard of Review

¶ 27 The trial court has broad discretion when imposing sentence, and a reviewing court must give deference to such decisions. *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). A reviewing court will not exercise its power to reduce the trial court's sentence absent an abuse of discretion. *People v. Mendez*, 2013 IL App (4th) 110107, ¶ 37, 985 N.E.2d 1047. Further, a reviewing court must not substitute its judgment for that of the trial court because it would have weighed the aggravating and mitigating factors differently. *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102. An abuse of discretion will be found where the sentence imposed is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000).

¶ 28 B. Defendant's Sentence

¶ 29 Aggravated discharge of a firearm is a Class 1 felony, and the sentencing range for such an offense is 4 to 15 years. 720 ILCS 5/24-1.2(b) (West 2010); 730 ILCS 5/5-4.5-30(a) (West 2010). At defendant's sentencing hearing on March 8, 2012, the trial court sentenced defendant to 12 years' imprisonment on each count. Defendant argues the court abused its discretion in imposing the sentence. Specifically, defendant argues "the Court abused its discretion given [defendant's] minimal criminal history, his acceptance of responsibility for his conduct, his demonstrated remorse, and his rehabilitation potential." Defendant also points out the actual shooter in this case, Robert Gilliam, was sentenced to 13 years' imprisonment, a sentence only one year longer than defendant's.

¶ 30 Defendant contends his minimal criminal history, remorse, acceptance of responsibility for his conduct, and rehabilitative potential are all factors that can be properly considered by the trial court. While we agree with this assertion, defendant fails to show the trial court did not consider these factors. When mitigating evidence is presented to the court, it is presumed the judge considered the evidence. *People v. Newbill*, 374 Ill. App. 3d 847, 854, 873 N.E.2d 408, 414 (2007). Here, the court specifically mentioned it had taken into account the evidence presented in mitigation and the statutory factors in mitigation.

¶ 31 Defendant notes Gilliam, who was the actual shooter in this case, pleaded guilty and received only 13 years' imprisonment. "[A] defendant who has stood trial cannot properly compare his sentence with those imposed on persons who have pleaded guilty." *People v. Reckers*, 251 Ill. App. 3d 790, 796, 623 N.E.2d 811, 816 (1993); see also *People v. Scott*, 2012 IL App (4th) 100304, ¶ 25, 966 N.E.2d 340 (In general, a sentence imposed after a guilty plea does not form a valid basis of comparison with respect to a sentence entered after a trial.). Therefore,

Gilliam's sentence provides no basis for reducing defendant's sentence.

¶ 32 Here, defendant was found legally responsible for the conduct of Gilliam, who shot a firearm into a crowd that included children and others unrelated to the underlying conflict. The trial court imposed a sentence on defendant that was within the statutory guidelines. In light of the egregious nature of the offense, we find the sentence imposed on defendant was not greatly at variance with the purpose and the spirit of the law, and we affirm.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed.